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Supreme Court of the United States

Motion for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Supreme Court of the United States

October Term, 1959

No. 524

NICOLA PANICHELLA, *Petitioner*,

v.

PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

This is an F.E.L.A. case. The issue is not negligence. Rather, petitioner is here because of a disagreement with the holding of the Court of Appeals that the terms of a release negotiated by petitioner's attorney and executed by petitioner after full explanation precluded recovery against respondent.

The uncontested facts are these: While employed by respondent for emergency snow removal during

the winter of 1950, petitioner, a trackman, as was his wont left the working premises to obtain a take-out lunch for his foreman and to have his own breakfast at the Palace Restaurant. The Palace was located about a mile away in the downtown area of Greensburg, Pennsylvania. Enroute to the Palace, petitioner fell on a public sidewalk abutting the premises of Warner Brothers Pictures, Inc., and sustained an injury.

Almost two years after the injury and prior to the institution of this cause, petitioner retained counsel to negotiate vis-a-vis both the owner of the cinema house and respondent with respect to the claim for his injury. Petitioner's attorney was successful in negotiating a complete settlement of his claim with the insurer of the cinema house owner whereby petitioner received $1,375 from the insurer. As part of the settlement, petitioner executed a release, the terms of which were fully explained to him by his own attorney and found to be satisfactory. In the release, petitioner discharged the cinema house owner "and all other persons, firms, and corporations" from "any and all claims" arising from the injury sustained from the fall on the sidewalk.*

* Before evaluating and considering the decision below, it is essential to understand the character of the instrument involved. This is not a release which inures to the benefit of respondent only if there exists between it and the cinema house owner a relationship of joint and common liability as in Dura Electric Lamp Co. v. Westinghouse Electric Corp., 249 F.2d 5 (3 Cir., 1957); The Ross Coddington, 6 F.2d 191 (2 Cir., 1925); and Pittsburgh Ry. Co. v. Chapman, 145 F. 886 (3 Cir., 1906). Neither is this document merely a covenant by petitioner not to sue a named party with a specific reservation of rights as to others such as the covenants in Huskie Refining Co. v. Barnes, 119 F.2d 715 (9 Cir., 1941), and McKenna v. Austin, 134 F.2d 659 (D.C. Cir., 1943). The release,

Subsequently, petitioner retained other counsel and instituted this action against respondent on the ground that under the F.E.L.A. his injury was the proximate result of respondent's negligence. The cinema house owner was joined as a third party defendant. At trial both respondent and the third party defendant relied on the release. Petitioner conceded that the release on its face embraced respondent, thus removing any possible issue of construction from the case. However, petitioner was successful in arguing that as a matter of law the release was not effective to discharge respondent. The jury was never advised of the existence of the release. Respondent's motion for a directed verdict was denied and the case was submitted to the jury, which returned special findings that the cause of petitioner's fall was due 45 per cent to petitioner's own negligence and 55 per cent to respondent's negligence.

On appeal, the Court of Appeals held that the release, conceded by petitioner on its terms to be applicable to respondent, was entitled by law to be given effect, and that it precluded recovery against respondent. Accordingly, the judgment was reversed as to respondent and affirmed as to the third party defendant.

REASONS FOR DENYING THE WRIT

We put to one side the inherent wonder of it all that respondent could have been negligent with respect to

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which is set forth in the Petition, p. 4, n. 1, discharged the cinema house owner and every other party whomsoever of all claims that petitioner might have by reason of the accident of December 14, 1950. The specific terms of the release itself, standing alone and without supplementation by other facts and circumstances discharged the respondent of liability to petitioner. Hodges v. United States Fidelity and Guaranty Co., 91 A.2d 473, 34 A.L.R. 2d 1101 (Mun. Ct. App. D.C. 1952); Falco v. Pennsylvania Railroad, 109 N.Y.S. 2d 279, 202 Misc. 769 (1951).

petitioner's fall on the public sidewalks of Greensburg. The petition is said to present a question as to "the construction of a release" which petitioner characterizes as "a question of fact to be determined from the surrounding conditions and circumstances." (Pet. p. 7.) Though petitioner conceded in both of the courts below that the release by its terms applied to respondent and argued only that as a matter of law the release did not preclude further recovery, there is method in petitioner's present characterization of the issue as one of fact. This characterization, which is made here for the first time, is designed to enable petitioner to assert in this Court, also for the first time, that he has been deprived of his right to a trial by jury on the question presented by the release.

Respondent questions the propriety of an argument here that the release is ambiguous since petitioner urged precisely the reverse before both of the courts below. This Court's rule precluding the consideration of issues not raised below prevents the consideration of petitioner's argument that the court below erred in not treating the question as turning on a factual ambiguity when petitioner argued below that the release presented only questions of law.

Petitioner has directed the attention of this Court to certain decisions holding that in F.E.L.A. cases all factual disputes including those concerning releases must be submitted for determination by the jury. *Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 356 U.S. 525, *Callen* v. *Pennsylvania Railroad Company*, 332 U.S. 625, 630, and *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525. However, the court below

did not ignore or violate the emphatic holdings of these and other cases simply because before a factual question may be submitted to the jury, a factual question must be raised; and it must be raised prior to attempting to invoke this Court's certiorari jurisdiction. The release executed by petitioner remains unchallenged and untainted by fraud, accident, mistake or overreaching. As the too belated nature of this "factual" argument becomes apparent, the petition is concluded with an argument the substance of which seems to be that releases are, as a matter of law, repugnant to Section 5 of the Federal Employers' Liability Act.

Because of petitioner's new tack, it becomes important to consider the way in which the issue was framed by the parties below and the manner in which the court below dealt with the issue. Respondent argued below that as a matter of law the trial court erred in holding that the release did not preclude recovery.* Petitioner, on the other hand, argued that although the release was applicable, respondent's reliance on it was precluded as a matter of law. This was the manner in which the case was presented to the

* The courts have consistently held that a release of all persons from all claims resulting from a given accident is that and nothing less. Perhaps the most complete analysis of the problem is to be found in Hodges v. United States Fidelity and Guaranty Co., 91 A. 2d 473, 31 A.L.R. 2d 1191 (Mun. Ct. of App., D.C., 1952). The most pertinent decision is that of the New York Supreme Court in Falco v. Pennsylvania Railroad, 109 N.Y.S. 2d 279, 202 Misc. 769 (1951). In the *Falco* case, the railroad employer which had not contributed to a third-party settlement was held to be discharged of liability by the terms of the release which ran to the third party "together with all other persons, firms and corporations." The only Pennsylvania decision in point followed the *Hodges* case: Holland v. McArdle, 9 D. & C. 2d 165 (C.P. Alleg. Co., 1957).

court below and this was the basis of the decision that the release precluded further recovery. The question was neither presented nor considered as a factual issue below. Petitioner may not now argue that the court below erred in doing precisely what petitioner asked it to do.

Even if petitioner had made his present attack on the release for the benefit of the court below, he could not have prevailed under the teaching of this Court in *Callen* v. *Pennsylvania Railroad Company*, 332 U.S. 625, 630. There the Court had before it a release which had been executed without the benefit of counsel on the representation that it was not a release. Petitioner there argued that this was evidence of a mutual mistake of fact or perhaps of presumed fraud. Here the release was negotiated by petitioner almost two years after his injury. Thus petitioner does not now object to the negotiation of the release nor does he claim fraud; but rather he objects only to the fact that the source of the consideration was the insurer of the third party defendant rather than respondent. It will be remembered that in *Callen* this Court held that the party attacking a release "must bear the burden of showing that the contract he has made is tainted with invalidities, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Petitioner here cannot and did not make any such attack. Instead, petitioner uses a variation of his new-found factual ambiguity argument and asserts that since the consideration was not paid by "all other persons, firms and corporations" the utilization of this phrase in the release and the reliance thereon constitutes deceptive artifice. Here petitioner cites *Dice* v. *Akron, Canton & Youngstown*

Railroad Co., 342 U.S. 359. In view of the fact that there is no suggestion as to the bona fides of petitioner's negotiation with the third party defendant and in view of the fact that respondent did not negotiate the release, and therefore could not have misled petitioner, the holding of the *Dice* decision could scarcely be of less help to petitioner. There the Court determined that an F.E.L.A. release was void

> "when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release." (Ibid. at 362)

To put it bluntly, petitioner does not present that case.

Alternatively, petitioner asserts that the release is "repugnant" to Section 5 of the Federal Employers' Liability Act, which provides that any contract to enable a common carrier to "exempt itself from any liability created by this Act, shall be to that extent void." (35 Stat. 66). That assertion was specifically rejected in *Callen* where it was found to be "obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." (Ibid. at 634). Section 5 of the Federal Employers' Liability Act proscribes certain contracts, regulations and devices intended to enable any common carrier "to exempt itself" from any liability. This proscription does not apply to releases limited to common carriers. Much less does it apply to releases executed by employees and third parties. The argument that respondent is benefiting from an oversight is captious. The all-party nature of the release in question was not only deliberate but it constituted the only

possible way of preventing claims for indemnification or contribution by strangers to the contract. Such releases are perhaps one of the most effective ways prospective litigants have of avoiding multiplicity of litigation and of advancing judicial administration. What petitioner fails to comprehend is that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Callen v. Pennsylvania Railroad Company*, supra at 630.

CONCLUSION

The petition presents no issue of fact whatsoever and no issue of law deserving consideration by this Court. The decision below is correct and does not conflict with any decision of this Court or with the decision of any other court. It is therefore submitted that the petition should be denied.

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